

STATEMENT OF CONSIDERATION RELATING TO
401 KAR 10:001 Amended after comments

Energy and Environment Cabinet
Department for Environmental Protection
Division of Water

- I** A public hearing on 401 KAR 10:001, 10:026, 10:029, 10:030, and 10:031 was held on July 23, 2008, at 10:00 am at the Capitol Annex in Room 149, Frankfort, Kentucky.
- II** The following people attended this public hearing or submitted written or oral comments:

Attended the public hearing:

<u>Name and Title</u>	<u>Affiliation</u>
Betsy Bennett, Conservation Chair	Sierra Club
Joanne Benante	US EPA
Andrea Zimmer	US EPA
Lloyd Cress, Attorney	
Sara Smith, President	Smith Management Group
Ronald Van Stockum, Jr., Attorney	
Kelly Bartley, Attorney	Greenebaum, Doll, and McDonald
Hank Graddy, Project Director	Kentucky River Watershed Watch
Eve Zimmerman	US EPA
Jason Flickner, Program Director	Kentucky Waterways Alliance
Gene Harrison, Compliance Assistance	Division of Compliance Assistance
Terry Anderson	
Judith Peterson, Executive Director	Kentucky Waterways Alliance
Hugh Archer, Board Member	Kentucky Waterways Alliance
Arnita Gadson, Executive Director	Environmental Quality Commission
Johnna McHugh, Director of Operations	Environmental Quality Commission
Steve Manning, Environmental Counsel	Paducah Remediation Services, LLC
Brenda Jones, Environmental Assoc. Counsel	Paducah Remediation Services, LLC

Submitted oral or written comments regarding the administrative regulation:

<u>Name and Title</u>	<u>Affiliation</u>
Jack C. Bender, Attorney	Greenebaum Doll and McDonald, PLLC
Betsy Bennett, Conservation Chairperson	Sierra Club, Cumberland Chapter
Bill K. Caylor, President	Kentucky Coal Association
Lloyd R. Cress, Jr.	Kentucky Association of Manufacturers, Chemical Industry Council (KAM/CIC)
Albert Ettinger, Counsel	Environmental Law & Policy Center of the Midwest
Tom FitzGerald, Director	Kentucky Resources Council
Timothy J. Hagerty, KY Chamber Environmental Policy Committee Chair	Kentucky Chamber of Commerce, Greater Louisville, Inc., and Commerce Lexington (The Chambers)
Emily Harkenrider, Analyst	Legislative Research Commission
Laura M. Knoth, Public Affairs Director	Kentucky Farm Bureau Federation
John Martin	Hopkinsville Water Environment Authority
Judith Petersen, Executive Director	Kentucky Waterways Alliance
Bruce Scott, Board President	Kentucky Waterways Alliance

III The following people from the promulgating administrative body attended this public hearing:

<u>Name and Title</u>	<u>Affiliation</u>
R. Bruce Scott, Commissioner	Department for Environmental Protection
Sandy Gruzsky, Director	Division of Water
Tom VanArsdall, Branch Manager	Division of Water
Randy Payne, Environmental Scientist	Division of Water
Ron Price, Branch Manager	Division of Water
Abby Powell, Regulations Coordinator	Division of Water

IV Summary of Comments and Responses for 401 KAR 10:001

(1) Subject Matter: Emergency regulation 401 KAR 10:001E

(a) Comment: Laura Knoth (Kentucky Farm Bureau Federation)

The Kentucky Farm Bureau Federation recommends the E-reg be withdrawn immediately due to an omission of the agriculture operations exemption from the “best management practices” definition. In addition, the Farm Bureau questions the need for an emergency definition regulation since the rest of the package is not designated as an emergency.

- (b) **Response:** KRS 13A.190(1)(a)4. states that an emergency administrative regulation is one that must be placed into effect immediately to protect human health and the environment, among other considerations. The emergency regulation is necessary because the water quality standards regulations were re-codified from 401 KAR Chapter 5 to Chapter 10. Without the emergency definitions, the water quality standards regulations would exist without defined terms and a misunderstanding of terms used in the regulations may cause a hazard to human health and the environment.
- (2) **Subject Matter: Inconsistent with 401 KAR 5:002**
- (a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC), Lloyd R. Cress, Jr. (KAM/CIC)
It is not clear how the definitions in new 401 KAR 10:001 will work in conjunction with the definitions in existing 401 KAR 5:002. Does the Division of Water intend to propose amendments to 401 KAR 5:002 to make those provisions consistent with those in Chapter 10? The definitions should be consistent and should be appropriately inclusive.
- (b) **Response:** The agency is currently considering drafts to 401 KAR 5:002 to make terms that are used in both chapters consistent with one another, where appropriate.
- (3) **Subject Matter: Cross-reference 401 KAR 5:002 and 10:001**
- (a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC)
The proposed 401 KAR 10:001 does not include a number of definitions that are found in Chapter 5. For persons who may be unfamiliar with the regulatory programs, some cross-reference to Chapter 5 would be helpful.
- (b) **Response:** Although the agency agrees that this method may be helpful, an extensive cross-referencing may create discrepancies as regulations are amended in the future. Amending a term in one chapter would necessitate amending any changes in subsection numbering in the cross-referenced regulations.
- (4) **Subject Matter: Acute criteria definition**
- (a) **Comment:** Judith Peterson (Kentucky Waterways Alliance), Betsy Bennett (Sierra Club), Tom FitzGerald (Kentucky Resources Council, Inc.), Bruce Scott (Kentucky Waterways Alliance), Albert Ettinger (Environmental Law & Policy Center of the Midwest)
The duration for the acute aquatic life criteria should be clarified. Currently, 401 KAR 10:001 (2) says simply “exposed for a brief period”, which is open to a variety of interpretations—a second, hour, several hours, 24 hours, perhaps several days. We believe that nothing longer than the 1 hour duration employed in EPA’s aquatic life criteria for toxic chemicals would be scientifically defensible.
- (b) **Response:** The agency agrees and has added a 1-hour duration limit to the definition.
- (5) **Subject Matter: Arithmetic mean and geometric mean**
- (a) **Comment:** John Martin (Hopkinsville Water Environment Authority)
Arithmetic mean for seven consecutive days and arithmetic mean for thirty consecutive days are defined, but not used in the subsequent regulations. Geometric mean is used in 10:030, but not defined.

- (b) **Response:** Geometric mean is not defined in 10:001, but since it is referred to as the conventional meaning of geometric mean in implementation per designated use support determination in 10:026 and 030, a definition is not necessary.
- (6) **Subject Matter: Best management practices should cite to KRS**
- (a) **Comment:** Laura Knoth (Kentucky Farm Bureau Federation)
Section 1(9) “best management practices” or “BMPs” should add the statutory definition of BMPs for agriculture, as given in KRS 224.71-100(3).
- (b) **Response:** The agency agrees and has made the change.
- (7) **Subject Matter: Best management practices, omission of agriculture operation exemption**
- (a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC), Lloyd R. Cress, Jr. (KAM/CIC)
Section 1(9): The definition of "best management practices" as proposed eliminates the phrase "for purposes other than agricultural operations" Please insert the excluded phrase so the definition will be consistent with the language in 401 KAR 5:002.
- (b) **Response:** The agency agrees that there should be language to specify the requirements of best management practices for agriculture operations. The definition will now point to the requirements that are established in statute, KRS 224.71-100(3).
- (8) **Subject Matter: Best management practices for point sources**
- (a) **Comment:** Laura Knoth (Kentucky Farm Bureau Federation)
Section 1(9) should be changed to “(9) Best Management practices (b) *may include treatment requirements. . .*”
- (b) **Response:** KRS 13A requires that definitions not use directive language. The terms “shall” and “may” indicate requirements, which is inappropriate in a definitions regulation.
- (9) **Subject Matter: Concentrated animal feeding operation**
- (a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC), Lloyd R. Cress, Jr. (KAM/CIC), Laura Knoth (Kentucky Farm Bureau Federation), Judith Peterson (Kentucky Waterways Alliance), Betsy Bennett (Sierra Club), Tom FitzGerald (Kentucky Resources Council, Inc.), Bruce Scott (Kentucky Waterways Alliance), Albert Ettinger (Environmental Law & Policy Center of the Midwest)
Section 1 (18): The definition of "concentrated animal feeding operation" is currently found in 401 KAR 5: 002 Section 1 (58) rather than Section 1 (37).
- (b) **Response:** The agency agrees that definitions for concentrated animal feeding operation need to be consistent across regulations. The definition will now point to the definition used in federal regulation rather than cross-referencing 401 KAR 5:002.

(10) Subject Matter: Conventional treatment

(a) Comment: Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC)

Section 1 (20) The Division's proposal does not explain the basis for this new definition of "conventional treatment." The term does not appear in 401 KAR Chapter 5, and the Division's drinking water regulations include a definition of "conventional filtration treatment" but not "conventional treatment." The basis for the new definition should be provided.

(b) Response: The term "conventional treatment" appears in the definition for "domestic water supply", Section (27) of 401 KAR 10:001. The term will be changed to "conventional domestic water supply treatment" to maintain consistency with Chapter 5.

(11) Subject Matter: Chronic criteria definition

(a) Comment: Judith Peterson (Kentucky Waterways Alliance), Betsy Bennett (Sierra Club), Tom FitzGerald (Kentucky Resources Council, Inc.), Bruce Scott (Kentucky Waterways Alliance), Albert Ettinger (Environmental Law & Policy Center of the Midwest)

The Cabinet definition: "the highest instream concentration of a toxic substance or an effluent to which organisms can be exposed indefinitely without causing an unacceptable harmful effect." While "exposed indefinitely" would seem to require protective standards, in practice it would be best to make clear that a 96 hour exposure will be measured and that a water body will be found to violate the chronic standard if it exceeds the standard during any 96-hour rolling average, otherwise, some might think that aquatic life would not be harmed unless the pollutant stayed above the criterion-concentration for much longer periods—weeks, months, or more. Applying averaging periods longer than 96 hours to available monitoring data could result in masking periods of 96 hours, perhaps even longer, when aquatic organisms have been exposed to harmful levels of one or more pollutant. The 96 hour exposure standard is the US EPA definition for "chronic exposure".

(b) Response: The agency agrees and has added the 96-hour duration parameters to the definition.

(12) Subject Matter: Day

(a) Comment: Judith Peterson (Kentucky Waterways Alliance), Betsy Bennett (Sierra Club), Tom FitzGerald (Kentucky Resources Council, Inc.), Bruce Scott (Kentucky Waterways Alliance) Albert Ettinger (Environmental Law & Policy Center of the Midwest)

On Page 4, Line 21 the Cabinet should clarify the definition of "Day" as either a 24 hour period starting at any time or from midnight to midnight. As a general rule, 24 hours of continuous exposure to a certain level of a pollutant (or stressor like low dissolved oxygen) has the same effect regardless of whether it started at 4 AM, 10 AM, 3 PM, 7 PM or 11 PM.

(b) Response: "Day" means a twenty-four hour period. This definition does not reference start or end times, so it may be any twenty-four hour period.

- (13) **Subject Matter: Division definition**
(a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC)
Section 1 (24): The name of the Cabinet should be changed to the Energy and Environment Cabinet.
(b) **Response:** The agency agrees and has made the change.
- (14) **Subject Matter: Impaired use**
(a) **Comment:** Judith Peterson (Kentucky Waterways Alliance), Betsy Bennett (Sierra Club), Tom FitzGerald (Kentucky Resources Council, Inc.), Bruce Scott (Kentucky Waterways Alliance), Albert Ettinger (Environmental Law & Policy Center of the Midwest)
The cabinet should provide a definition of “impaired use.”
(b) **Response:** See definition for “impairment”, Section 1(41).
- (15) **Subject Matter: Modified Warm Water Aquatic Habitat**
(a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC), Lloyd R. Cress, Jr. (KAM/CIC), Judith Peterson (Kentucky Waterways Alliance), Betsy Bennett (Sierra Club), Tom FitzGerald (Kentucky Resources Council, Inc.), Bruce Scott (Kentucky Waterways Alliance), Albert Ettinger (Environmental Law & Policy Center of the Midwest)
Section 1 (55): Regarding the proposed addition of the definition of "Modified Warm Weather Aquatic Habitat", the term used elsewhere in the regulatory package is "Modified Warm Water Aquatic Habitat" so a correction is needed. Additionally, see comments regarding this proposed change in use designation.
(b) **Response:** The MWAH use and its definition have been eliminated in the revised regulation.
- (16) **Subject Matter: Point Source**
(a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC), Lloyd R. Cress, Jr. (KAM/CIC)
Section 1 (65): The proposed definition of "point source" differs from the current definition in 401 KAR 5:002 and under the federal regulations at 40 CFR 122.2. Since the definition of "point source" is critical to the implementation of the NPDES permitting program in Kentucky, the definition should continue to follow that of the federal regulations to assure implementation by the Cabinet consistent with the requirements of KRS 224.16-050.
(b) **Response:** The definition for “point source” has been modified to point to a federal citation in order to maintain consistency among regulations.
- (17) **Subject Matter: Preexisting discharge**
(a) **Comment:** Timothy J. Hagerty (The Chambers), Jack C. Bender (Greenebaum Doll & McDonald, PLLC)
The definition for preexisting discharge, Section 1(67), provides a citation for 401 KAR 5:040 as a regulation for KPDES permits. The current version of 401 KAR 5:040

contains treatment requirements for coal remining operations and is being repealed. The discrepancy in citations needs to be addressed.

(b) **Response:** The agency agrees and has deleted the term from the regulations.

(18) Subject Matter: Incorporation of the “Agriculture Handbook Number 703”

(a) **Comment:** **Laura Knoth (Kentucky Farm Bureau Federation)**

In 401 KAR 5:002, the “Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation” was incorporated by reference. The Kentucky Farm Bureau Federation would like it incorporated in 10:001.

(b) **Response:** The handbook is incorporated by reference to clarify the meaning of “stormwater discharge associated with small construction activity.” The term is not used in chapter 10 regulations, so it is unnecessary to provide this clarification by incorporating the handbook.

(19) Subject Matter: Drafting corrections

(a) **Comment:** **Emily Harkenrider (Legislative Research Commission)**

Ms. Harkenrider suggested several technical drafting corrections, including updating the cabinet name and correcting a citation.

(b) **Response:** The agency agrees and has made the change.

V. Summary of Statement of Consideration and Action Taken by Promulgating Administrative Body

401 KAR 10:001. Definitions for 401 KAR Chapter 10. Comments were considered and the following changes are suggested:

Page 1

RELATES TO

Line 8

After "40 C.F.R.", insert "136, EO 2008-507, 2008-531".

Delete "Part 136".

Page 1

NECESSITY, FUNCTION, AND CONFORMITY

Line 11

At the beginning of the line, delete “Environmental and Public Protection”.

Line 12

After "all water pollution.", insert the following:

EO 2008-507 and 2008-531, abolish the Environmental and Public Protection Cabinet and establish the new Energy and Environment Cabinet.

Page 1

Section 1(2)

Line 18

After “be exposed for”, add “one (1) hour”.

Delete the following:

a brief period of time

Page 2

Section 1(6)

Line 9

After “(6)”, delete the following:

"Arithmetic mean for seven (7) consecutive days" means the average of a minimum of two (2) samples taken on separate days in a seven (7) day period.

(7) "Arithmetic mean for thirty (30) consecutive days" means the average of a minimum of three (3) samples collected in separate calendar weeks during a period of thirty (30) consecutive days with a minimum of twenty (20) days occurring between the first and last sample days.

(8)

Renumber remaining subsections accordingly.

Page 3

Section 1(9)(a)

Line 1

After “(a)”, insert the following:

For agriculture operations, as defined by KRS 224.71-100(3); or

(b) For all other purposes:

1.

Line 3

After “the commonwealth; and”, insert “2.”.

Delete “(b) Include”.

Page 3

Section 1(12)

Line 12

After “to be exposed”, insert “for ninety-six (96) hours”.

Delete “indefinitely”.

Page 4

Section 1(16)(a)

Line 1

After "coal mining operation", insert a comma.

Page 4

Section 1(18)

Line 10

After “feeding operation””, insert the following:

means one of the following:

(a) “Large concentrated animal feeding operation” as defined in subsection (45) of this section;

(b) “Medium concentrated animal feeding operation” as defined in subsection (50) of this section; or

(c) “Small concentrated animal feeding operation” as defined in subsection (76) of this section.

(17) “Conventional domestic water supply treatment” means or includes coagulation, sedimentation, filtration, and disinfection.

Delete the following:

is defined by 401 KAR 5:002 Section 1(37).

Page 4

Section 1(20)

Line 15

Delete subsection (20) in its entirety.

Page 4

Section 1(21)

Line 18

After "water constituents", insert "that".

Delete "which".

Page 5

Section 1(24)

Line 2

After "Environmental Protection,", insert "Energy and Environment".

Delete "Environmental and Public Protection".

Page 5

Section 1(27)

Line 9

After “that with conventional”, insert “domestic water supply”.

Page 7

Section 1(47)

Line 13

After “(47)”, insert the following:

“Large concentrated animal feeding operation” is defined by 40 C.F.R. 122.23(4), effective July 1, 2007.

(46)

Renumber remaining subsections accordingly.

Page 7

Section (50)

Line 23

After “substance in question.”, insert the following:

(50) “Medium concentrated animal feeding operation” is defined by 40 C.F.R. 122.23(6), effective July 1, 2007.

Page 8

Section 1(55)

Line 9

After “(55)”, delete the following:

“Modified Warm Weather Aquatic Habitat” means water that has been found to be incapable of supporting and maintaining a balanced, integrated, adaptive community of warm water organisms because of largely irretrievable man-induced changes in the watershed or to the physical habitat of the stream itself.

(56)

Renumber remaining subsections accordingly.

Page 9

Section 1(60)

Line 1

After “by a point source.”, insert the following:

(60) "Other wastes" means sawdust, bark or other wood debris, garbage, refuse, ashes, offal, tar, oil, chemicals, acid drainage, wastes from agricultural enterprises, and other foreign substances not included within the definitions of industrial wastes and sewage that may cause or contribute to the pollution of any waters of the commonwealth.

Page 9

Section 1(65)

Line 8

After “ ‘Point source’”, insert the following:

is defined by 33 U.S.C. 1362(14).

Delete the following:

means a discernible, confined, and discrete conveyance from which pollutants are or may be discharged.

Page 9

Section 1(67)

Line 12

After “(67)”, delete the following:

"Preexisting discharge" means a discharge that is occurring when applying for a KPDES permit under 401 KAR 5:040 or 401 KAR 10:029.

(68)

Renumber remaining subsections accordingly.

Page 10

Section 1(71)

Line 1

After "Clean Water Act", insert "33 U.S.C. 1251-1387."

Page 10

Section 1(76)

Line 11

After "of ten (10) years.", insert the following:

(76) "Small concentrated animal feeding operation" is defined by 40 C.F.R. 122.23(9) effective July 1, 2007.

Page 10

Section 1(80)

Line 20

After "with the surface.", delete "Effluent ditches and".

After "for waste treatment", insert "and effluent ditches".